IN THE HIGH COURT OF JUDICATURE FOR
RAJASTHAN
AT JAIPUR BENCH JAIPUR.

S.B. CIVIL WRIT PETITION NO.4896/2007.

Seema Devi Tomar
Vs.
State and ors.

Date of order:- 22nd October, 2007.

PRESENT
**HON'BLE MR.JUSTICE MOHAMMAD RAFIQ**

Shri Bajrang Lal Sharma Senior Advocate with
Shri Manoj Bhardwaj for the petitioner.
Shri B.K. Sharma, Deputy Government Advocate for the State.
Shri A.K. Pareek, Intervener.

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Reportable

The petitioner has challenged the order dated 7/7/2007 passed by the Deputy Secretary (Adm.-I), Rural Development and Panchayati Raj Department, Government of Rajasthan, Secretariat, Jaipur by which he was declared disqualified to continue as Member of Panchayat Samiti Nadbai in view of the bar contained in Section 19(l) of the Rajasthan Panchayati Raj Act.

2) Factual matrix of the case is that petitioner was elected as Member Panchayat Samiti Nadbai on 8/2/2005. One Atar Singh filed a complaint against him that she was not eligible to

contest the election because on that date she had a third child born to her after the cut-off date i.e. 27/11/1995 and violated Section 19(l) of the said Act because the above child was born sometime in the year 2000. Petitioner submitted a false affidavit before the returning officer declaring otherwise. A preliminary enquiry was conducted by the Development Officer Panchayat Samiti Nadbai who found the allegations against the petitioner substantiated and it was on that basis that the government vide order dated 11/7/2005 declared the petitioner as disqualified to hold that office and the office was declared vacant. This order was challenged by the petitioner in SBCWP No.6263/2005. This Court vide order dated 17/8/2005 stayed operation of the order. In the meantime, the Additional Secretary (Enquiry) Panchayati Raj Department, Government of Rajasthan by his order dated 26/11/2005 stayed the operation of the order dated 11/7/2005 and held the order dated 11/7/2005 in abeyance. According to the petitioner, when the government stayed the operation of that order, he decided to withdraw the writ petition. The government suspended

operation of the order dated 11/7/2005 while considering the review application of the petitioner and recommending the necessity to hold a fresh enquiry. In his enquiry report dated 14/3/2007, the Chief Executive Officer who conducted the fresh enquiry recorded that the complaint against the petitioner was false and that the charge of having third child after the cut-off date was not established. Yet, the respondents-government with an ulterior motive to purposely deny him right to participate in the proceedings of no confidence motion against the Pradhan of Panchayat Samiti Smt.Kanta by passing an arbitrary and illegal order dated 7/7/2007 stayed operation of the order dated 11/7/2005 and the order dated 26/7/2005. Hence, this writ petition.

3) Learned counsel for the petitioner argued that the controversy raised in this petition is squarely covered by decision of the Larger Bench of this Court in **Smt.Sameera Bano Vs. State of Raj. & Ors. : 2007 WLC (Raj.) 526** wherein it has been held that an elected Sarpanch/Member of the Panchayat, cannot be proceeded against by the

government in an administrative enquiry for removal in exercise of its powers under Section 39 read with Section 19(l) of the Act. The petitioner has challenged the order dated 7/7/2007 as well as the order dated 26/11/2005 and both these orders were based on the alleged disqualification of the petitioner admittedly for a period anterior to the date of her election. The Larger Bench held that the government cannot remove such elected member on the basis of pre-election disqualification for which only remedy available is to file an election petition challenging the election.

4) Learned counsel for the petitioner has relied on the judgment of the Hon'ble Supreme Court in **V.D. Barot Vs. State of Gujarat and others : (2002) 10 SCC 668** and argued that when the government has passed order on 7/7/2007, it has given rise to a fresh cause of action. Even otherwise when earlier writ petition was withdrawn by the petitioner, without there being an adjudication on merits, subsequent writ petition would still be maintainable.

5) On the other hand, Shri B.K. Sharma, learned Deputy Government Advocate and Shri A.K.

Pareek, learned counsel appearing for the Intervener opposed the writ petition and argued that the present writ petition was not maintainable because the earlier writ petition which was filed on the same subject-matter was withdrawn without any liberty to file fresh one. Such a writ petition would be barred by the principle of *res judicata* as also by the provisions of Order 23 Rule 1A CPC. It was argued that the subsequent order dated 7/7/2007 is nothing but a renewal order of the basic order dated 11/7/2005 and no fresh order as such has been passed by the government therefore, this writ petition is liable to be dismissed as being not maintainable.

6) Learned counsel for the respondents relied on the judgments of Hon'ble Supreme Court in UOI Vs. Suberam 1996 SCC 663, 2002(1) SCC 668, **Radha Krishna Vs. State of Rajasthan : RLW 1976 p.671** and **Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior and others : AIR 1987 SC 88** and argued that withdrawal of earlier writ petition without specific liberty to file fresh one, would bar second writ petition on the same

cause of action.

7) I have given my thoughtful consideration to the rival submissions made at the bar and perused the record as well as the judgments cited at the bar.

8) Both the learned counsel have cited the judgments on the principle of *res judicata* as also on the law relating to interpretation of Order 23 Rule 1A CPC but I need not much dwell upon them because the order dated 26/11/2005 in itself was not an order withdrawing the earlier order passed by the respondent, dated 11/7/2005 wherein the petitioner was declared disqualified to continue as elected member. It would be evident from that order that this order was passed in consideration of the review petition filed by the petitioner before the government which upon consideration thereof held that further enquiry was necessary in the light of the anomaly between the facts and the records and held the order dated 11/7/2005 in abeyance. Further enquiry was thereafter held. The Chief Executive Officer submitted a further enquiry report on 14/3/2007 to the government and on consideration of that report, the impugned

order dated 7/7/2007 was passed by the government. In fact, the order dated 7/7/2007 also states that the earlier order dated 26/11/2005 held the order dated 11/7/2005 in abeyance only with a view to facilitating the fresh enquiry in the matter. This subsequent order would while reviewing the original order certainly give rise to fresh cause of action. There can thus be no question of the bar of *res judicata* or violation of provisions of Order 23 Rule 1A CPC in such a situation. Besides, it is clear from the subsequent enquiry that the government decided to again revive the original order dated 11/7/2005 whereby the petitioner was declared to have become disqualified to hold the office of Member and his office was declared vacant. This subsequent order of the respondents apparently suffers from the malice in law if not on facts because for the ostensible reason for which the earlier order dated 11/7/2005 was held in abeyance was to provide him opportunity of hearing and hold fresh enquiry and when the petitioner participated in the fresh enquiry and the report of the fresh enquiry which was conducted by the Chief Executive Officer, Zila

Parishad, Bharatpur was indeed favourable to him, yet the respondents revived the earlier order. But decision of the writ petition need not be based on that aspect because of what has been held by the Full Bench of this Court in Smt.Sameera Bano supra which squarely covers the controversy involved in the present case and form sufficient basis for allowing the present writ petition. The Full Bench in Smt.Sameera Bano supra held that “a pre-election disqualification can be adjudicated only in an election petition before the District Judge under Section 43 of the Act read with rule 80 of the Election Rules and cannot be adjudicated by the authority under rule 23 of the Rules.”

In the result, the writ petition is allowed and the impugned orders dated 11/7/2005 and 7/7/2007 are quashed and set-aside. There shall be no order as to costs.

**(MOHAMMAD RAFIQ), J.**

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